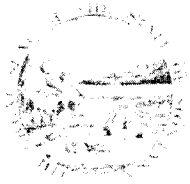
SENATE JUDICIARY
EXHIBIT NO. 6
DATE 1/12/11
BILL NO. SB 106

ATTORNEY GENERAL
STATE OF MONTANA

Steve Bullock
Attorney General



Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

April 7, 2010

Senator Robert R. Story, Jr.
133 Valley Creek Rd.
Park City, MT 59063-8040

Representative Scott Sales
5200 Bostwick Rd.
Bozeman, MT 59715-7721

Dear Sen. Story and Rep. Sales:

I have carefully reviewed your letter received by my office April 6, 2010.

Like you, I take seriously my oath of office to "protect and defend the constitution of the United States, and the constitution of the state of Montana," as well as to "discharge the duties of my office with fidelity." The discharge of my constitutional duties as the legal officer of the state comes before politics or personal interest. Therefore, my office has defended challenges to the Legislature's acts when there is a credible basis for doing so, regardless of which political party may have supported any particular law.

Your letter asks me to join a minority of state Attorneys General who are asking the courts to strike down as unconstitutional a federal law duly enacted by a majority of members in Congress, all of whom have sworn a similar oath to the Constitution of the United States. I have analyzed these claims as I analyze constitutional challenges to our own laws, with the understanding that overturning the constitutional judgment of a popularly elected legislature is a grave matter in a constitutional democracy.

Although your letter is short on legal specifics, it appears that your contentions center on the requirement to maintain minimum essential coverage under the "Individual Responsibility" Part of Subtitle F, which provides exceptions for religious objectors, individuals who cannot afford coverage, and others for whom health insurance is a hardship. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501 (2010). That section opens with detailed congressional findings that "[t]he requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." Id., § 1501(a)(2). It also notes, correctly, that the Supreme Court long has recognized that insurance is interstate commerce subject to Federal

regulation. Id., § 1501(b), citing United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944). These legislative findings, like the findings you make as legislators, are legally entitled to respect by the courts.

Congress has the power under Article I, Section 8 of the Constitution "to make all Laws which shall be necessary and proper for carrying into Execution" its power "[t]o regulate Commerce ... among the several States." This power includes regulation of intrastate activity, like the costs imposed by the use of the health care system by the uninsured, where even trivial actions amount to a cumulative and substantial effect on interstate commerce. See Gonzales v. Raich, 545 U.S. 1 (2005). As Justice Scalia explained in Raich, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." Id. at 35 (Scalia, concurring). This has been established law for almost seventy years, since the Supreme Court upheld the Agricultural Adjustment Act (one of the first farm bills) against a similar challenge to the one you propose. See Wickard v. Filburn, 317 U.S. 111 (1942).

Congress also has the power under Article I, § 8 of the Constitution to "[t]o lay and collect Taxes ... to provide for the common Defence and general Welfare of the United States, " including "taxes on income, from whatever source derived, without apportionment among the several States." U.S. Const. Amend. XVI. This power includes taxation and spending that Congress finds to be conducive to the general welfare, see South Dakota v. Dole, 483 U.S. 203 (1987), a determination Congress has made with respect to the tax imposed on individuals who do not carry minimum essential health insurance. This too has been established law for more than seventy years, since the Supreme Court upheld the Social Security Act (another mandatory insurance program) against a similar challenge to the one you propose. See Helvering v. Davis, 301 U.S. 619 (1937).

You also invoke the Tenth Amendment, which provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." You are correct that the Tenth Amendment invalidates the rare occasions in our history when Congress has attempted to conscript or commandeer state officials. See United States v. Printz, 521 U.S. 898 (1997). Yet you reference nothing in the Act that does so. For example, if a State does not establish a health benefit exchange, the Secretary of Health and Human Services will do it instead. See Patient Protection and Affordable Care Act, § 1321. The lawsuit you urge me to join does claim that States participating in the federal Medicaid program must provide coverage, but also concedes that States may "avoid the Act's requirements" by "drop[ping] out of the Medicaid program." Florida v. Sebelius, Complt. ¶ 40. Although this choice would leave millions of people uninsured, it is a choice any of the States may make if they disapprove of how Congress wants federal Medicaid funds spent, and this choice is consistent with the Tenth Amendment. See New York v. United States, 505 U.S. 144 (1992).

The lawsuit also presents serious standing and ripeness issues, given that it appears to be filed based more on the timing of the November 2010 elections than the date in 2014 when individuals and states might first be subject to the Act's requirements.

Therefore, I have concluded that once you take the politics out of these issues, there is no credible constitutional claim. So, like nearly three-quarters of my Democratic and Republican colleagues in state Attorney General offices across the country, I have not joined the lawsuit. We are not alone in our bipartisan opposition to politicizing the Constitution and the courts in this way. Eighteen of your Republican counterparts in the United States Senate sponsored a similar health insurance reform bill in 1993, see S.1770, 103rd Cong. (1993), and I do not doubt their fidelity to their constitutional oath. Lawyers and constitutional scholars across the political spectrum have determined, as President Reagan's former Solicitor General Charles Fried has said, that the lawsuit is "simply a political ploy" without legal merit.

As legislators, you understand as much as any citizen the importance of resolving our heartfelt policy differences through the democratic process. Montana's decision not to join these lawsuits will not change the outcome if, contrary to nearly a century of precedent, the Supreme Court takes the surprising step of striking down this law and taking the country back to the days when the farm bill and social security were constitutionally suspect. Most importantly, however, Montana's decision not to join these lawsuits leaves these critical questions of national policy in the hands of "We the People" and our elected representatives, where these decisions belong.

Sincerely,

STEVE BULLOCK
Attorney General

SB:sj

c: Legislative co-signers